



The voice and vision of special education

The Council for Children with Behavioral Disorders

A Division of the Council for Exceptional Children

CCBD'S POSITION SUMMARY

ON

Federal Policy on Disproportionality in Special Education

Approved by the Executive Committee on April 11, 2012

This document provides policy recommendations of the Council for Children with Behavioral Disorders (CCBD) regarding disproportionality in special education and the need for federal policy driving state regulations to support efforts to eliminate this outcome in schools. Monitoring requirements in the 1997 and 2004 amendments to the Individuals with Disabilities Education Act (IDEA) acknowledged the extent of racial/ethnic disproportionality in special education, especially when Congress designated this concern among the top three priority areas for monitoring and enforcement in IDEA 2004. However, federal interpretations of the 2004

requirements by the U. S. Department of Education have created confusion at the State (SEA) and Local Education Agency (LEA) levels. While quantitative indices of racial/ethnic disparities remain high, an increasing number of states are finding no LEAs with disproportionality when it must be shown that disproportionality was caused by inappropriate identification. Such data suggest that federal interpretations of IDEA 2004, subsequent regulatory guidelines, and the design of indicators for monitoring and enforcement have not been effective in addressing disproportionate representation in special education. This policy paper includes (a) a review of information on the extent, status, and causes of special education disproportionality (b) a review of the history and issues involved in the enforcement of IDEA's disciplinary provisions, and (c) recommendations for improving federal policy regarding disproportionality in special education.

Introduction and Background

Extent and Status of Special Education Disproportionality

Special education, guaranteeing the rights of students with disabilities to a free and appropriate public education, has been throughout its history a part of the struggle for civil rights. Advocates who brought the first legal challenges to the inappropriate exclusion of students with disabilities were inspired by, and modeled their legal strategies upon, the civil rights movement in the 1950's and 1960's (Smith & Kozleski, 2005). Concerns about racial and ethnic disproportionality in special education were central to the earliest court cases (e.g., *Mills v. Board of Education*, 1972) that led to the promulgation of the first anti-discrimination laws including the Rehabilitation Act of 1973, and the Education for All Handicapped Children Act (*P.L. 94-142*, 1975), and many of the early influential writings on special education (Dunn, 1968; Mercer, 1973) raised racial inequity as a central issue for the field. Moreover, concerns about the misuse of special education labeling for African American children were commonly raised in

legal challenges to segregated schools after 1954 when segregated schools were struck down as inherently unequal (Losen & Welner 2002). So it is ironic that, despite court challenges, abundant research, and policy initiatives, racial and ethnic disproportionality persists as a critical and unresolved problem in the field.

As Losen and Welner (2002) observed, culturally and linguistically diverse students are twice vulnerable to discrimination: first by race and again by disability. National data from the U.S. Department of Education Office for Civil Rights (OCR) have revealed consistent patterns over time in the disproportionate representation of some racial/ethnic groups in special education (e.g., Chinn & Hughes, 1987; Donovan & Cross, 2002; Finn, 1982). For African-American students, there have been consistent findings of over-representation in overall special education service, as well as the categories of mental retardation (MR) and emotional disturbance (ED). Secondary analyses of national data-bases have reported that that African-American students are the group most over-represented in special education programs in nearly every state (Parrish, 2002). In addition, American Indian/Alaska Native students have been found to be over-represented in the category of learning disabilities (LD). Findings for Hispanic/Latino students have been somewhat inconsistent. While there have been some state and district-based studies that have found Latino over-representation in special education (Artiles, Rueda, Salazar & Higuera, 2002; Wright & Santa Cruz, 1983), the *under*-representation of Latino students is more common in both overall special education service and in disability categories where Latino disproportionality is in evidence (Chinn & Hughes, 1987; NCCRESt, 2006).

Additional characteristics of disproportionate representation in special education service have been noted in the literature. Rates of over-representation in special education tend to increase as a racial or ethnic minority group constitutes a larger percentage of their states'

population (Parrish, 2002). In addition, racial and ethnic disparities are typically found less frequently in the non-judgmental or “hard” disability categories, such as hearing impairment, visual impairment, or orthopedic impairment, and more often in the judgmental or “soft” disability categories of MR, ED, or LD (Donovan & Cross, 2002; Parrish, 2002)..

Racial and ethnic disparities for students with disabilities have also been found with respect to the restrictiveness of various educational settings. Both African American and Hispanic students have been found to be over-represented in more restrictive educational environments and under-represented in less restrictive settings (Fierros & Conroy, 2002; Skiba, Poloni-Staudinger, Simmons, Gallini, and Feggins-Azziz , 2006). It has been suggested that racial and ethnic disparities in educational setting are due to the disproportionate representation of some groups in disability categories that are more likely to receive service in more restrictive settings (OSEP, 2002). Yet more detailed analyses of disproportionality in educational settings have found African-American children were more likely than their peers *with the same disability* to be over-represented in more restrictive settings, or under-represented in the general education setting (Skiba et al., 2006), especially in milder, more judgmental categories such as *learning disabilities* or *speech or language impairment*. Given a dramatically increased commitment to serving students with disabilities in general education (McLeskey, Henry, & Axelrod, 1999), it could be argued that the under-representation of culturally and linguistically diverse students in less restrictive educational environments may be more important than disparities in disability categories.

Finally, issues of discipline remain central to issues of disproportionality in special education. The over-representation of African-American students in a range of disciplinary outcomes, including office referrals, suspension, corporal punishment, and school expulsion has

been well-documented for nearly 40 years (Bradshaw, Mitchell, O'Brennan & Leaf, 2010; Children's Defense Fund, 1975; Eitle and Eitle, 2004; Losen, 2011; Raffaele Mendez & Knoff, 2003; Payne & Welch, 2010; Skiba et al., 2011; Wu et al., 1982). There are also indications of racial disproportionality in the application of the specific disciplinary provisions of IDEA. Rausch & Skiba (2006) found that African-American students with disabilities were 2.8 times more likely than other students with disabilities to receive at least one of the categories of disciplinary exclusion monitored by IDEA. Investigations of disproportionality in referrals to special education or pre-referral teams consistently find that African-American students are more likely to be referred for behavioral reasons (Gottlieb, Gottlieb, & Trongone, 1991; MacMillan & Lopez, 1996).

Causes of Disproportionate Special Education Representation

A number of factors have been identified as possible causes and maintaining conditions of special education disproportionality, but the research literature is insufficient to accept any single cause as fully determinative of racial disparity. Extensive research investigation in the 1970's and early 1980's suggested that test bias was not sufficient to fully explain racial and ethnic disparities in achievement or special education referral, but more recent research suggests that test bias has not been conclusively ruled out as a contributing factor (Valencia & Suzuki, 2000), especially for English Language Learners (Abedi, 2004). It is clear that wide disparities in educational opportunities, such as poor facilities (Kozol, 2005) or absence of highly qualified personnel (Darling-Hammond, 2004), probably contribute to disproportionate outcomes, but the impact of such disparities on actual rates of special education referral has not been addressed. Research investigations have found mixed evidence concerning the contributions of the special education eligibility process to disproportionality (Donovan & Cross, 2002), although

breakdowns in the referral decision-making process remain a plausible source of contribution to racial disparities (Harry & Klingner, 2006). Issues of behavioral management at the classroom level (Vavrus & Cole, 2002) and overall school climate (Gregory, Cornell, & Fan, 2011) appear to contribute to both rates of school discipline and racial disparities in discipline, but more direct observational research is needed to document the specific processes that drive the relationship between classroom management and school discipline outcomes. Finally, although it remains an uncomfortable topic, the literature on stereotype threat (Steele, 1997), cultural mismatch (King, 2005), micro-aggressions towards individuals of color (Howard, 2008; Sue, 2010), and implicit bias (Amodio & Mendez, 2010) suggests that conscious or unconscious bias must be considered as a possible contributor to special education disproportionality.

Thus, there appears to be no one single cause driving special education disproportionality. Instead, racial/ethnic disparities in special education are likely due to complex interactions among student characteristics, teacher capabilities and attitudes, and the structural characteristics of schools. The multi-determined nature of disproportionality suggests that (a) the form that disproportionality takes will likely differ in different schools and school systems, and (b) that intervention will need to be multi-faceted, in order to respond to the full complexity of the problem. Yet it is important to note that there remains a serious dearth of research that specifically seeks to reduce racial and ethnic disparities in special education. A ERIC search between the years 1980 to 2010 using the terms *disproportionality* or *over-representation*, *special education*, and *intervention* or *program* revealed only three data-based published reports of individual or systems-based research aimed specifically at reducing disproportionate rates of special education referral (Gravois & Rosenfield, 2006; Hernandez et al., 2008; Lo & Cartledge, 2006).

Implementation and Interpretations of Federal Disproportionality Provisions

Remedies to racial disproportionality were first introduced as part of the IDEA in the 1997 Individuals with Disabilities Education Amendments Act, requiring that states begin to monitor the presence of disproportionality in local education agencies (LEA's) and

In the case of a determination of significant disproportionality ... provide for the review and, if appropriate, revision of policies, procedures and practices used in such identification or placement to ensure that such policies, procedures and practices comply with the requirements of this Act." Section 618 (c) [available at <http://www2.ed.gov/policy/speced/leg/idea/idea.pdf>].

These provisions were considerably strengthened in IDEA 2004. Three of the most notable changes were that the 2004 Act (a) made special education disproportionality one of three priority areas for monitoring and enforcement, (b) shifted from an emphasis fixing non-compliance with special education law to prevention in the general education setting, and (c) made interventions mandatory, including the use of 15% of the district's IDEA funds spent on early intervening services when racial disproportionality was deemed significant in identification, placement or discipline, thus focusing change efforts on the general education setting.

These changes represented a welcome advance in monitoring and enforcement. Yet the interpretation of statute, which in turn has driven OSEP's implementation efforts, has been fraught with confusion and backpedaling, and may have contributed to an under-identification of LRE's with disproportionate representation. A number of issues involving interpretation of the statute by the USDOE Office of Special Education Programs have been problematic, including the introduction of two distinct required inquiries into disproportionality and allowing for the use of several different definitions of the phenomenon within the same state, along with the ongoing failure to monitor racial disparities in discipline.

Significant Disproportionality vs. Disproportionate Representation

The 2004 amendments to IDEA expanded the attention given to disproportionality and, for the first time, included consideration of racial disparities among students with disabilities subjected to long term suspension (Williams, 2007). The statutory provisions governing disproportionality are found in Sections 612, 616, and 618 of the act:¹

Section 618 (d)(1) states:

- Each State that receives assistance under this subchapter, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the local educational agencies of the State with respect to—
- (A) the identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 1401 (3) of this title;
 - (B) the placement in particular educational settings of such children; and
 - (C) the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.
- (20 U.S.C. 1418(d))

Enforcement provisions were added to the definition of significant disproportionality, requiring that LEAs found to have significant disproportionality in any of these areas spend 15% of their Part B funds on coordinated early intervening services pursuant to section 613(f). (618(d)(2)).

Congress also made it clear that disproportionality was to be considered a high priority by specifically including disproportionality as one of three delineated monitoring priorities, in

Section 616:

- (C) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification. (20 U.S.C. 1416 (a)(3)(C))

The Secretary of Education was to monitor the States, and each state was charged with monitoring their districts in the priority areas using quantifiable and qualitative indicators. Indicator 9 requires states to identify the proportion of districts exhibiting “disproportionate representation of racial and ethnic groups in special education and related services, to the extent

the representation is the result of inappropriate identification” [20 U.S.C. §1416(a)(3)(C)].

Indicator 10 requires states to identify the percent of districts in the state with "disproportionate representation of racial and ethnic groups in specific disability categories that is the result of inappropriate identification" [20 U.S.C. §1416(a)(3)(C)].

Despite the separate locations of required actions to address racial and ethnic disproportionality in the Act, it is highly unlikely that Congress intended to create two entirely distinct and independent sets of policy to remedy special education disproportionality, since no such distinction had ever been previously proposed in research or practice. Yet the implementing regulations and especially the policy guidance (OSEP, 2007) issued during the Bush Administration interpreted the language of IDEA 2004 as two separate concepts, *significant disproportionality* under Section 618, and *disproportionate representation* under Section 616.²

Table 1 presents the distinctions between significant disproportionality and disproportionate representation as they have been operationalized by OSEP. According to the implementing regulations and guidance provided by OSEP, significant disproportionality includes only issues of over-representation of racial and ethnic groups, while disproportionate representation has been interpreted as including both issues of over- and under-representation. Significant disproportionality addresses issues of disproportionality in educational environments, while the monitoring for disproportionate representation excludes the examination of disproportionality with regard to the restrictiveness of the environment. Significant disproportionality clearly includes racial and ethnic disproportionality in school discipline as a trigger mechanism, but legal interpretations from the Office of Special Education Programs under the Bush Administration initially included, then removed, then reinserted consideration of racial disparities in the monitoring of disproportionality in discipline (see fuller description

below). Significant disproportionality is viewed as a simple numerical criteria that may be defined by each state, but triggers the use of funds for prevention without qualitative considerations or a finding of non-compliance with the Act. In contrast, disproportionate representation is dependent on first finding that the disparity in question was caused by *inappropriate identification*, determined through the qualitative review of LEA policies, practices, and procedures. As a result, the review of policies, practices, and procedures at the LEA level becomes a *consequence* of identification for significant disproportionality, but part of the *criteria* needed to establish disproportionate representation as a result of inappropriate identification.

Other Issues of Interpretation

In a number of areas, the federal interpretation of IDEA statutory language appears to run counter to consistent findings in special education research. Requiring that judgments of disproportionality be based upon procedural non-compliance in special education is inconsistent with a long line of research indicating that general education practices make an important and probably primary contribution to special education disparities (Donovan & Cross, 2002; Harry & Klingner, 2006; Heller, Holtzman & Messick, 1982; Skiba et al., 2008). Moreover, while there is a strong and consistent data-base concerning the over-representation of culturally and linguistically diverse students in special education (see e.g., Donovan & Cross, 2002; Losen & Orfield, 2002), issues of under-representation are only beginning to be explored (Perez, Skiba, & Chung, 2008). With almost no research-based guidance to rely on, it is unclear how SEA's and LEAs will be able to apply evidence-based interventions to address under-representation. Finally, research has documented that the over-representation of culturally and linguistically diverse (CLD) students in more restrictive environments is a serious concern (Fierros & Conroy,

2002; Skiba et al., 2006). Yet although educational environments are part of the determination of *significant disproportionality*, policy interpretations from OSEP do not include educational environments in the monitoring and enforcement of *disproportionate representation*. There appears to be widespread misunderstanding among parents and teachers about the nature of disproportionality (Shippen, Curtis, & Miller, 2009). It seems unlikely that federal policy promulgating idiosyncratic distinctions that are not always grounded in the evidence base will in any way allay that confusion.

Inappropriate Identification

Where IDEA 2004 sought to expand the inquiry required beyond issues of compliance with special education law, and to require prevention, the interpretation by the Bush Administration that Congress intended only to prioritize disproportionate representation *due to inappropriate identification* (read as non-compliance with the Act) seems to represent a retreat into the procedural language contained in the 1997 Act. IDEA 2004's implementing regulations heavily emphasized the notion of disproportionate representation *due to inappropriate identification*. Under the implementing regulations and subsequent guidance from OSEP (OSEP, 2008), monitoring disproportionate representation is defined as a two-step process. First, quantitative criteria (e.g., risk ratio) are applied in order to make a determination of disproportionate representation. Second, the policies, practices, and procedures of each LEA exhibiting numerical disproportionate representation are examined to determine whether that disproportionate representation is due to inappropriate identification.

OSEP guidance documents have noted that the term *inappropriate identification* is intended to move beyond special education eligibility determination to include a range of variables in both special and general education (Williams, 2007). Yet guidance offered by OSEP,

and the definitions adopted by most states, assess the presence or absence of inappropriate identification primarily through the examination of LEA policies, practices, and procedures. To what extent has research shown that policies, practices, and procedures of special education identification and referral contribute to disproportionate outcomes in special education service?

The evidence is mixed. Large discrepancies between actual practice and IDEA requirements have been documented in the special education eligibility determination process. Harry and Klingner (2006), for example, described numerous inconsistencies in evaluations and IEP team meetings that may contribute to disproportionality, including the deference in eligibility decisions given to the opinion of the experts and their interpretation of tests, as compared to information provided by parents or deficiencies in instruction. Yet research on factors associated with disparities (Donovan & Cross, 2002; Harry & Klingner, 2006; Heller, Holtzman & Messick, 1982; Skiba et al., 2008) has consistently found that special education disproportionality is determined by a complex range of factors (see above). Leaders in the field (e.g., Losen, 2008; Reschly, 2009) have argued that special education eligibility determination may indeed be a less significant contributor to disproportionate outcomes than these other factors. Thus, interpreting “policies, practices, and procedures” solely as an examination of the narrow range of processes involved in determining eligibility for special education would be inconsistent with our best knowledge of over thirty years of research on the possible causes of disproportionality, making it highly likely that a large proportion of the causes of special education inequity would remain unaddressed.

Racial/Ethnic Disparities in Discipline and IDEA Enforcement

Among the added provisions of the 2004 Amendments to the Individuals with Disabilities Education Act was the analysis of racial disparities as part of provisions requiring states to

monitor levels of suspension and expulsion for students with disabilities, and to compare these with their non-disabled peers. The IDEA in 2004 sought remedies to racial disproportionality in discipline in two provisions, Section 612 and 618. To implement the statutory requirements OSEP originally prescribed that states provide the Secretary with information on two discipline indicators. Indicator 4a asked states to report on the incidence of long-term suspension for students with disabilities as compared to their non disabled peers, while Indicator 4b required states to monitor the same discrepancies, further disaggregated by racial/ethnic category(1412(a)(22)).

From the start, however, all provisions of IDEA that called for an examination of race faced resistance from the Bush Administration. President Bush's signing of IDEA 2004 was accompanied by a signing statement expressing reservations about, among other provisions, the disproportionality clauses of the law, thus claiming the right to selectively implement those provisions (Statement on Signing, 2004). That selective implementation eventually carried forward into educational policy with the first round of monitoring state *Annual Performance Review/State Performance Plan (APR/SPP)* documents in 2007, in the decision to remove Indicator 4b from monitoring. The response to all state submissions under Priority 4b was that data monitoring was "not required" due to a concern about its constitutionality. Finally, OSEP issued a guidance document that allowed states to begin collecting data on Indicator 4b in 2011, but modifying the priority based on the rationale that the collection of race-based data could raise Constitutional concerns:

- B. Percent of districts identified by the State as having a significant discrepancy in the rates of suspensions and expulsions of children with IEPs of greater than 10 days in a school year by race and ethnicity *and that have policies, procedures or practices that contribute to the significant discrepancy and that do not comply with requirements relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards.*

The added language regarding policies, practices, and procedures is a novel interpretation of the provisions of IDEA. In contrast to its guidance concerning significant disproportionality and disproportionate representation, in which OSEP interpreted existing statutory language literally, the provisions added in this case are nowhere to be found in the law itself. The OSEP guidance concerning Indicator 4b prompted a number of prominent scholars, including Harvard Law School Dean Martha Minow, and civil and disability rights advocacy organizations, to formally petition the U.S. Office of Management and Budget to return to the original indicator 4b guidance (The Civil Rights Project et al., 2008), arguing that the new restrictions would (a) prevent parents and advocates from becoming aware of statistical discrepancies, (b) set overly narrow restrictions, ignoring factors such as teacher quality or cultural bias that have been shown to be associated with disproportionate outcomes, and (c) unnecessarily delay the enforcement of IDEA provisions for seven years from the passage of the law in 2004. To this point, there has been no indication from the Obama Administration concerning whether it intends to retain or revise this interpretation of Indicator 4b.

Outcomes: Do Policy Interpretations Effect Disproportionality Findings?

As part of the monitoring and enforcement process for the IDEA monitoring indicators, OSEP has instituted an annual review process. The *Annual Performance Review (APR)* of the *State Performance Plan (SPP)* is submitted each year by all states and territories and includes a description for each indicator, the state definition used, the types of data being collected, data describing state progress in addressing the indicator, and the types of interventions or programs being implemented for LEAs found to be out of compliance. In response, OSEP finds states either in or out of compliance with respect to the provisions of IDEA 2004.

Table 2 represents the extent of disproportionality reported for each state for Indicator 9, overall special education disproportionality, in the first three *APR/SPP* reports from the states. Those data show that few states find any LEAs showing evidence of disproportionate representation due to inappropriate identification, and that the percent of states finding zero districts out of compliance has been increasing, from 55% in the 2005-2006 data, to 76% in the 2006-07 data, and 85% for 2007-08. Analysis of data for Indicator 10 reveals similar conclusions: 50% of states found no districts with disproportionate representation due to inappropriate identification in 2005-06; 54% found no districts out of compliance in 2006-07; and 68% of states found no LEAs with disproportionate representation due to inappropriate identification in 2007-08. The 2009 *APR/SPP* Summary Report suggests that these data represent a “numerical improvement over previous years” (*APR/SPP* Summary Report, 2009, p. 92).

More extensive analyses raise serious questions, however, concerning the degree to which these data indicate improvement. Albrecht, Skiba, Losen, Chung, and Middelberg (2011) analyzed four years of data from the Annual Performance reports (2006-07 to 2008-2009 school years) and compared those findings with state risk ratios for disproportionality drawn from *Annual Reports to Congress* on the implementation of IDEA. State APR reports indicated a trend among states towards setting higher risk ratio criteria between 2005 and 2008. While 15% of states set a criteria of less than two times discrepant to indicate non-compliance in 2005, none did so by 2008, while the number of states setting a risk ratio criterion of more than four times discrepant tripled during the same time period. The use of the qualitative criterion of *inappropriate identification* also appears to have an impact in reducing the identification of districts: Although the percent of school districts meeting quantitative criteria for disproportionality has increased slightly over time, the application of the *inappropriate*

identification clause reduces the rate of identification of school districts to nearly zero for both Indicator 9 and Indicator 10. The 28th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act reports that nationally, African American students remain 2.83 times more likely than other students to be served in the category *mentally retarded* and 2.24 times as likely to be served in the category *emotionally disturbed*. Given these national and state figures, a plausible alternate hypothesis is that the "numerical improvement" represented in the *APR/SPP* reports is not a reflection of real improvement in racial and ethnic disparities, but rather an indicator of the failure of OSEP's current system of monitoring and enforcement to find continuing disproportionality in special education.

Recommendations

The disproportionality provisions of IDEA 2004 emerged from a decades-long concern to address the over-representation of students of culturally and linguistically diverse students in special education identification and more restrictive placements. The inclusion of those principles in statute appeared to be a positive step forward. Yet interpretations of statute in the implementing regulations, and especially in guidance offered by OSEP that has emphasized procedural compliance in identification, has reduced the effectiveness of policy efforts to address and reduce racial and ethnic disparities in special education. As the professional association representing teachers of children with emotional and behavioral disorders, CCBD offers the following short- and long-term recommendations for improving monitoring and enforcement of federal disproportionality provisions contained within IDEA. It should be noted that CCBD continues to applaud the presence of provisions addressing disproportionality in IDEA; these recommendations are intended as a means of improving the implementation and enforcement of those provisions.

Immediate or Short-Term Recommendations

In the short-term, federal and state efforts should be focused on bringing disproportionality monitoring efforts more into line with the spirit of special education law, moving away from procedural compliance towards a focus on identifying, addressing, and preventing a range of issues that may contribute to disproportionate representation. Specific recommendations include:

1. *Shift the monitoring of SEA and LEA practices from a narrow focus on compliance with procedural aspects of eligibility determination to a broadened focus on the multiplicity of factors, including those in general education, that have been identified as contributing to special education disproportionality.* Racial and ethnic disparities in special education appear to be a function of a wide range of variables, from behavior management to cultural competence, with contributions from both general and special education. A narrow focus on special education policies, practices, and procedures through such practices as special education file review will almost certainly fail to capture many of the most important causes of disproportionality, in turn restricting the capability of interventions to address true causal factors.
2. *Prevent states from defining disproportionality in ways that minimize or mask the identification of true disparities at the LEA level.* National criteria using both the risk index and risk ratio might provide one method for reaching this goal. An alternate approach might be to develop guidelines regarding the minimum percentage of districts that a state must identify as long as that state's risk ratio indicates that disproportionality remains an issue.

3. *Interpret "inappropriate identification" broadly, to include all educational practices that might contribute to disproportionate representation, not simply those within special education.* Guidance from OSEP should acknowledge that corrective action plans submitted by LEA's found out of compliance should include changes to all "inappropriate policies, practices and procedures," not only those that violate a particular law. Rather, LEAs found to have disproportionate representation should be required to investigate and take remedial action on *all* possible inappropriate factors that may be contributing, in both special *and* general education.
4. *Ensure full reporting of the extent of disproportionality.* OSEP should increase its attention to the public reporting of disproportionality, holding states to the requirement that LEAs found out of compliance with respect to the disproportionality indicators be publicly identified [20 U.S.C. §1416(b)(2)(C)(ii)(I)]. Under these requirements, not only is the state required to monitor data for each LEA, but it is also required that "The State shall report annually to the public on the performance of each local educational agency...on the targets in the State's performance plan." Currently, OSEP requires states to report only on the percentage of districts found out of compliance, making it impossible for the public to assess the performance of any particular LEA. In order to meet the requirements of the statute, public reports of states should provide detail on racial and ethnic disproportionality in the areas of identification, placement and discipline *for each identified LEA*. Further, this annual public reporting by district should include (a) information concerning the level of disproportionality and (b) remedial efforts planned or in progress. Finally, rather than limiting reporting of disproportionality to those instances where disproportionality was determined to be caused by inappropriate

policies, practices or procedures, OSEP should require that states report to the public all data concerning LEA disproportionality, including initial data on the quantitative level of racial disproportionality in identification, restrictive environments, and discipline.

5. *Ensure that monitoring efforts are consistent with Congressional intent in framing the disproportionality provisions of IDEA.* It is clear that both (a) racial disproportionality in discipline and (b) attention to disproportionality in least restrictive environments were both intended by Congress to be important components to be addressed in IDEA's disproportionality provisions. Accordingly, OSEP should ensure that both of these issues are addressed in all definitions, monitoring, and enforcement. It is important to note that OSEP is not restricted to monitoring only those areas deemed priorities. Specifically, under the heading "Permissive Areas of Review," Congress explicitly authorized the Secretary to "consider other relevant information and data, including data provided by States under section 618." (20 U.S.C. Sec 1416 (a)(4))
6. *Acknowledge the long-term nature of the problem.* Requirements that all instances of disproportionality must be corrected within one year may motivate SEAs or LEAs out of compliance to engage in "quick fixes" that fail to address the deeper root causes of disproportionality. In cases where non-compliance with a federal or state law is determined to be causing disproportionate representation, OSEP should require correction of those factors contributing to non-compliance within a year. In cases in which it is apparent that large-scale systemic change will be required to address longstanding issues, the remedy should begin within a year, but it should be acknowledged that corrective action addressing systemic issues may require longer periods for full implementation.

7. *Increased focus on issues of culture.* The Findings section of IDEA 2004, which provides a guide to the intent of Congress in framing the law, noted in particular large discrepancies between the increasing diversity of our Nation's students, and the homogeneity of its teaching force (National Center for Educational Statistics, 2004). Issues of cultural responsiveness in both general and special education have been consistently identified in the literature as key contributors to racial and ethnic disparities in special education (Cartledge & Kourea 2008; Garcia & Ortiz, 2004). Further, the difficulty that educators have in addressing the topic of race (Singleton & Linton, 2006; Tatum, 2001) suggests that federal and state leadership will be required in order to ensure that needed conversations about race and culture occur. State and federal guidance should focus increasingly on providing professional development and technical assistance in order to (a) increase recruitment of an increasingly diverse teaching force, (b) increase pre-service and in-service training on culturally responsive pedagogy and classroom management, and (c) encourage and increase frank conversations about race and culture whenever racial and ethnic disparities are identified.
8. *Increased focus on intervention and prevention.* Identifying the extent to which disproportionate representation exists is merely the first step in addressing disproportionality, not the ultimate goal. In order to move towards reducing disproportionate outcomes, OSEP should increase its focus on intervention and remediation of those factors in general and special education have been identified in research as contributing to disproportionate representation. IDEA 2004 also mandates that states have in place policies and practices to prevent overidentification or disproportionate representation by race or ethnicity (20 U.S.C. 1412(a)(24)). This

requirement has been underutilized, and should become a more prominent focus in federal enforcement and monitoring efforts.

Recommendations: Intermediate or Long-Term

Some of the issues that have plagued monitoring and enforcement of disproportionality at the federal and state level are due to inconsistent use of terminology within the statute itself, suggesting reconsideration of specific language regarding disproportionality during the re-authorization of IDEA. Long-term efforts should also be focused on increasing the availability of research on intervention approaches and improved staff training in cultural competence.

Specific recommendations include:

1. *Consider whether disproportionate representation and significant disproportionality are or should be different terms and processes.* The terms *disproportionate representation* and *significant disproportionality* emerged as separate descriptors in different sections of IDEA 2004, but had never previously been identified as separate constructs in research or practice. Although two terms may be necessary at this point due to the language of IDEA, interpretations of those terms have yielded a dual system of monitoring and enforcement that creates confusion at the state and local level. A single term that is more clearly defined and in line with best evidence could be expected to increase progress towards reducing or eliminating disproportionality.
2. *Reconsider the necessity of the qualifier "inappropriate identification."* The addition of the term *inappropriate identification* appears to be one important factor driving low rates of identification of districts with disproportionality. Vague and inconsistently defined terms make monitoring and enforcement difficult at best, and it is not clear whether the qualitative term *inappropriate identification* can be defined in a clear enough manner to

allow the consistent measurement needed for effective monitoring and enforcement efforts.

3. *Address structural needs through research and training priorities.* Racial and ethnic disparities in our educational system, including disproportionality in special education, are the result of a long history of racial discrimination and will require a significant long-term effort in many schools and districts. To ensure that SEAs and LEAs have the resources they will need to engage in long-term reform efforts, the U.S. DOE should promote grant competition priorities that support the study and development of:
 - a. Interventions and systems reform efforts focused on specifically addressing and reducing disproportionate representation in special education and school discipline;
 - b. Improved pre-service and in-service training of teachers and administrators in culturally responsive instruction and classroom management and discipline; and
 - c. Improved school-based data collection systems for monitoring disaggregated data and in particular for training school personnel in the interpretation and use of such data to improve practices.

Conclusion

Making progress in ensuring the civil rights of all of America's students has never been easy or straightforward. From Dwight Eisenhower to Robert Kennedy the federal government provided leadership that enforced the intent of federal legislation, often in the face of intense local resistance. In the same way, OSEP provided exemplary leadership in guidance issued throughout the 1970's and 80's on a number of key issues concerning the rights of students with disabilities; many of those rulings became enshrined as statute in IDEA 1997 and 2004.

In March of 2010, Secretary of Education Arne Duncan stood on the Edmund Pettis Bridge in Selma, Alabama and spoke on the importance of strengthening civil rights enforcement in education (Duncan, 2010). He suggested that students with disabilities and Black students, especially males, are suspended far more than their White counterparts and often punished more severely for similar misdeeds. In July, 2011, the Departments of Education and Justice announced the Supportive School Discipline Initiative, a joint project designed to address disciplinary practices that push students out of school and into the juvenile justice system, and to support effective discipline practices that foster safe and productive learning climates (U.S. Dept. of Justice, 2011). Finally, on March 6, 2012, Secretary Duncan announced the release of the USDOE Office for Civil Rights *Civil Rights Data Collection* by stating “The undeniable truth is that the everyday educational experience for many students of color violates the principle of equity at the heart of the American promise. It is our collective duty to change that.” (Duncan, 2012)

These represent highly encouraging signs that the U.S. Department of Education is once again providing key leadership on civil rights. As the organization representing students in one of the two disability categories in which racial and ethnic disparities are most in evidence, CCBD shares the Secretary’s vision of our collective duty to address issues of educational equity. We believe that the recommended changes in monitoring and enforcement policy for the disproportionality provisions of IDEA will move special education policy in a direction consistent with those goals, and we offer our support and assistance to the Department in all efforts to more effectively address, and ultimately eliminate, racial and ethnic disparities in special education.

References

- Albrecht, S. F., Skiba, R. J., Losen, D. J., Chung, C. G., & Middelberg, L. (2011). Federal policy on disproportionality in special education: Is it moving us forward? *Journal of Disability Policy Studies*, June 7, 2011, DOI: 10.44207311407917.
- Amodio, D. M., & Mendoza, S. A. (2010) Implicit intergroup bias: Cognitive, affective, and motivational underpinnings. In *Handbook of implicit social cognition: Measurement, theory, and applications* (pp. 353-374). New York, NY, US: Guilford Press, 2010.
- Artiles, A. J., Rueda, R., Salazar, J. J., & Higareda, I. (2002). English language learner representation in special education in California urban school districts. In D. J. Losen & G. Orfield (Eds.) *Racial Inequity in special education*. (pp.117-135) Cambridge: Harvard Education Publishing Group.
- Cartledge, G., & Kourea, L. (2008). Culturally responsive classrooms for culturally diverse students with and at risk for disabilities. *Exceptional Children*, 74(3), 351-371.
- Chinn, P. C., & Hughes, S. (1987). Representation of minority students in special education classes. *Remedial and Special Education*, 8, 41-46.
- Darling-Hammond, L. (2004). Inequity and the right to learn: Access to qualified teachers in California's public schools. *Teachers College Record*, 106(10), 1936-1966.
- Donovan, M. S., & Cross, C. T. (Eds.). (2002). *Minority students in special and gifted education*. Washington, D.C.: National Academies Press.
- Dunn, L. M. (1968). Special education for the mildly retarded – is much of it justifiable? *Exceptional Children*, 23, 5-21.
- Eitle, T. M. N., & Eitle, D. J. (2004). Inequality, segregation, and the overrepresentation of African Americans in school suspensions. *Sociological Perspectives*, 47, 269-287.

- Fierros, E. G., & Conroy, J. W. (2002). Double jeopardy: An exploration of restrictiveness and race in special education. In Losen, D. J. & Orfield, G. (2002). *Racial inequity in special education*. Cambridge, MA: Harvard Education Press.
- Finn, J. D. (1982). Patterns in special education placement as revealed by the OCR survey. In K. A. Heller, W. H. Holtzman, & S. Messick (Eds.), *Placing children in special education: A strategy for equity* (pp. 322-381). Washington, DC: National Academy of Sciences National Academy Press.
- Garcia, S. B., & Ortiz, A. A. (2004). *Preventing disproportionate representation: Culturally and linguistically responsive prereferral interventions*. Tempe, AZ: National Center on Culturally Responsive Educational Systems.
- http://www.niusileadscape.org/lc/Record/183?search_query=Disproportionate%20Representation
- Gregory, A., Cornell, D., & Fan, X. (2011). The relationship of school structure and support to suspension rates for black and white high school students. *American Educational Research Journal*, 1-31.
- Gravois, T. A., & Rosenfield, S. A. (2006). Impact of instructional consultation teams on the disproportionate referral and placement of minority students in special education. *Remedial and Special Education*, 27(1), 42-52.
- Harry, B., & Klingner, J. (2006). *Why are so many minority students in special education? Understanding race and disability in schools*. New York: Teachers College Press.
- Heller, K. A., Holtzman, W. H., & Messick, S. (Eds.). (1982). *Placing children in special education: A strategy for equity*. Washington, D.C.: National Academy Press.

- Hernandez, J. E., Ramanathan, A. K., Harr, J., & Socias, M.(2008). Study of the effects of an intervention to reduce the disproportionate identification in the category of emotional disturbance in the Los Angeles Unified School District. *Journal of Special Education Leadership, 21*, 64-74.
- Howard, T. C. (2008). Who really cares? The disenfranchisement of African American males in Pre K-12 schools: A critical race theory perspective. *Teachers' College Record, 110*, 954-985.
- Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*
- Kozol, J. (2005). *The shame of the nation: The restoration of apartheid schooling in America*. New York: Crown Publishers.
- Lo, Y., & Cartledge, G. (2006). FBA and BIP: Increasing the behavior adjustment of African American boys in schools. *Behavioral Disorders, 31*, 147-161.
- Losen, D. J. & Orfield, G. (2002). *Racial inequity in special education*. Cambridge, MA: Harvard Education Press.
- Losen, D. J., & Welner, K. G. (2002). Legal challenges to inappropriate and inadequate special education for minority children. In D. J. Losen & G. Orfield (Eds.), *Racial inequity in special education* (pp. 167-194). Cambridge, MA: Harvard Education Press.
- McLeskey, J., Henry, D., & Axelrod, M.I. (1999). Inclusion of students with learning disabilities: An examination of data from reports to congress. *Exceptional Children, 66*, 55-66.
- MacMillan, D. L., & Reschly, D. J. (1998). Overrepresentation of minority students: The case for greater specificity or reconsideration of the variables examined. *Journal of Special Education, 32*, 15-24.

Mercer, J. (1973). *Labeling the mentally retarded*. Berkeley, CA: University of California Press.

Mills v. Board of Education of the District of Columbia, 384 F. Supp. 866 (1972).

National Center for Culturally Responsive Educational Systems (NCCRESt) (2006).

Disproportionality by race and disability 2003-2004 [Data file]. Retrieved February 23rd, 2006 from National Center on Culturally Responsive Educational Systems web site:

<http://nccrest.eddata.net/data/index.php?id=47&f1=2003-2004&f2=Hispanic>

National Center for Education Statistics (2004) *Characteristics of schools, districts, teachers, principals, and schools libraries in the United States, 2003–04: Schools and Staffing Survey*, Retrieved March 31, 2012, from <http://nces.ed.gov/pubs2006/2006313.pdf>

Parrish, T. (2002). Racial disparities in the identification, funding, and provision of special education. In D. J. Losen & G. Orfield (Eds.), *Racial inequity in special education*. Cambridge, MA: Harvard Education Press.

Payne, A. A., & Welch, K. (2010). Modeling the effects of racial threat on punitive and restorative school discipline practices. *Criminology*, 48(4), 1019-1062.

Perez, B., Skiba, R. J., & Chung, C. G. (2008). *Latino students and disproportionality in special education (Policy Brief Vol 6, No. 2)*. Bloomington, IN: Indiana University Center for Evaluation and Education Policy.

Rausch, M. K., & Skiba, R. J. (2006). *Examining patterns of disciplinary disproportionality by disability status and racial group*. Bloomington, IN: Center for Evaluation & Education Policy.

Reschly, D. (2009, January). *Prevention of Disproportionate Special Education Representation Using Response to Intervention*. Washington, D. C.: National Comprehensive Center for

Teacher Quality Downloaded 3/1/10 from

http://www.tqsource.org/forum/documents/TQ_Issue_Paper_RTI_Disproportionality.pdf

- Shippen, M.E., Curtis, R., & Miller, A. (2009). A qualitative analysis of teachers' and counselors' perceptions of the overrepresentation of African Americans in special education: A preliminary study. *Teacher Education and Special Education*, 32, 226-238.
- Singleton, G. E., & Linton, C. (2006). *Courageous conversations about race: A field guide for achieving equity in schools*. Thousand Oaks, CA: Corwin Press.
- Skiba, R. J., Simmons, A.B., Ritter, S., Gibb, A. C., Rausch, M. K., Cuadrado, J., & Chung. C. (2008). Achieving equity in special education: History, status, and current challenges. *Exceptional Children*, 74(3), 264-288.
- Skiba, R. J., Poloni-Staudinger, L., & Gallini, S. (2006). Disparate access: The disproportionality of African American students with disabilities across educational environments. *Exceptional Children*, 72(4), 411.
- Smith, A., & Kozleski, E. B. (2005). Witnessing *Brown*: Pursuit of an equity agenda in American education. *Remedial and Special Education*, 26(5), 270-280.
- Statement on Signing the Individuals with Disabilities Education Improvement Act of 2004, December 3rd, 2004, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=63382>.
- Sue, D. W. (2010). *Microaggressions in everyday life: Race, gender, and sexual orientation*. Hoboken, NJ, US: John Wiley & Sons Inc.
- Tatum, B. D. (2001). Talking about race, learning about racism: The application of racial identity development theory in the classroom. In E. Cashmore & J. Jennings (Eds.), *Racism: Essential readings*. Thousand Oaks, CA: Sage.

- Trent, S. C., Kea, C. D., & Oh, K. (2008). Preparing preservice educators for cultural diversity: How far have we come? *Exceptional Children*, 74(3), 328-250.
- U.S. Department of Education. (June 2009). Questions and answers on disproportionality. Washington, DC. Retrieved from the world wide web at <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C9%2C>.
- U.S. Department of Justice (July 21, 2011). *Attorney General Holder, Secretary Duncan Announce Effort to Respond to School-to-Prison Pipeline by Supporting Good Discipline Practices*. Retrieved from the world wide web on March 31, 2012 at <http://www.justice.gov/opa/pr/2011/July/11-ag-951.html> .
- Vavrus, F., & Cole, K. (2002). "I didn't do nothin'": The discursive construction of school suspension. *The Urban Review*, 34, 87-111.
- Valencia, R. R., & Suzuki, L. A. (2000). *Intelligence testing and minority students: Foundations, performance factors, and assessment issues*. Thousand Oaks, CA: Sage.
- Williams, P. (2007). *Disproportionality and overrepresentation*. (Module 5 in the National Dissemination Center for Children with Disabilities (NICHCY) *Building the Legacy: Training Curriculum on IDEA 2004*). Washington, D.C.: NICHCY. (Downloaded July 20, 2007 from <http://www.nichcy.org/training/contents.asp#toc>).
- Wright, P., & Santa Cruz, R. (1983). Ethnic composition of special education programs in California. *Learning Disability Quarterly*, 6, 387-394.

Table 1. Differential Requirements for Significant Disproportionality and Disproportionate Representation

	Significant Disproportionality	Disproportionate Representation
Type of Disproportionality	Only over-representation	Both <i>over-</i> and <i>under-</i> representation
Scope	Overall eligibility; disability categories; discipline by race/ethnicity; educational environments	Overall eligibility; disability categories; (discipline by race/ethnicity at best unclear)
Data required	Only numerical finding	Numerical finding + qualitative finding of inappropriate identification
Review of Policies, Practices, & Procedures	Consequence of finding of significant disproportionality	Part of determination of disproportionate representation
Consequence of finding to LEA	Mandatory reservation of full 15% of CEIS funds	Corrective action plan and continued monitoring

Table 2. Number of States Reporting Percentage of LEAs with Disproportionality Due to Inappropriate Identification, 2005-06 – 2007-08.^a

APR Report Year Indicator 9	0%	0.1–2.9%	3.0–5.9%	6.0–8.9%	9% or Higher	Total SEAs
2007-08	42	6	1	1	0	50
2006-07	38	7	4	1	0	50
2005-06	26	13	3	3	2	47

^a Reprinted from Part B APR/SPP State Report Summary Document, 2009

Footnotes

¹ The legislative language is identical in the Public Law, and in the United States Code. The section numbers of the Public Law are retained in part in the statute as officially recorded in the U.S. code by replacing the first 6 with 14. Section 612 becomes 20 U.S.C. Sec. 1412; Section 616 becomes 20 U.S.C. Sec. 1416, and 618 becomes 20 U.S.C. Sec. 1418. Both are used in this article.

² In contrast to the Bush administration's separation of 616 and 618, the statute itself calls for a more coordinated approach guided by the principle of prevention. Specifically, in the section on State eligibility requirements called "Overidentification and Disproportionality" the law requires that for eligibility "The State has in effect, *consistent with the purposes of this title and with section 618(d)*, policies and procedures *designed to prevent* the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities...." (Cite Section 612(a)(24) emphasis added).

The Executive Committee of CCBD recognizes and thanks Advocacy and Governmental Relations Committee members Russ Skiba and Susan Albrecht (Chair), and Dan Losen of the Civil Rights Project for primary authorship of drafts of this position summary.

© 2012 Council for Children with Behavioral Disorders. All rights reserved. Unlimited copying and distribution are permitted with appropriate acknowledgement.